SUPREME COURT, U. S.

JAN 23 1974

MICHAEL RODAK, JR., C

# In the Supreme Court of the United States

OCTOBER TERM, 1973

**No. 73-954**

STANDARD OIL COMPANY OF CALIFORNIA, *et al.*,
*Petitioners,*

vs.

STATES OF ALASKA, ARIZONA, CALIFORNIA, OREGON, WASHINGTON, *et al.*,
*Respondents.*

## Brief in Opposition to a Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Petitioners prayed that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this action on October 3, 1973. Respondent State of Arizona argues that certiorari is both unnecessary and inappropriate.

### OPINIONS BELOW

The opinion of the Court of Appeals, as amended, is printed in Petitioners' Appendix A and at 487 F.2d 191, (9th Cir. 1973). The opinion and order of the District Court (350 F.Supp. 1369) is printed in Petitioners' Appendix B at page 18.

## STATUTES INVOLVED

Section 1 of the Sherman Act (15 U.S.C. § 1) provides:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal . . . Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor . . ."

Section 2 of the Sherman Act (15 U.S.C. § 2) provides:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . ."

Section 4 of the Clayton Act (15 U.S.C. § 15) provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

## STATEMENT OF THE CASE

The cases at bar present the issue of whether an antitrust violator can stretch *Hanover Shoe*[1] into a defense against actions for damages by public purchasers of price-fixed asphalt. The State of Arizona paid contractors to build highways, paying the contractors the bid price per unit quantity of asphalt, however much the actual quantity necessary differed from the bid-estimate quantity. The defendants rigged the price of the asphalt that the contractors

1. *Hanover Shoe v. United Shoe Machinery*, 392 U.S. 481 (1968).

used, and so it must be assumed at this stage of the proceedings. The State of Arizona can show, and already has in a pretrial brief, by appropriate market data, that it was injured in each of its transactions with contractors, on a ton by ton basis. Violation of the Sherman Act by the defendants caused the injury. The Clayton Act entitles the State of Arizona to its lawful damages. The defendants' attempt to interpose dicta in *Hanover Shoe,* a case which *found* liability, to defeat liability here, deserves the rejection that the Court of Appeals, upon due deliberation, gave to it.[2] *Hanover Shoe* doesn't fit.

## ARGUMENT

While the opinion of the Court of Appeals, in the abstract, is both interesting and persuasive, it is the opinion of but one Court of Appeals. Petitioners Standard Oil of California *et al.* aver that the decision conflicts with that of another Court of Appeals[3] (again mistaking dicta for the holding),[4] and then cite a number of District Court decisions, both ways.[5] Petitioners' inability to do more demon-

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2. In Re Coordinated Pretrial Proceedings In Western Liquid Asphalt Cases *State of Alaska, et al. v. Standard Oil Company of California, et al.,* (9th Cir. No. 73-1086; Opinion October 3, 1973 amended November 30, 1973). The opinion appears at page 2 of the Petitioners' Appendix A and 487 F.2d 191.

3. *Mangano v. American Radiator and Standard San. Corp.,* 438 F.2d 1187 (3rd Cir. 1971), discussed at page 17 of the Petition. *Mangano* at best involves plumbing fixtures purchases far more remote than the but one step removed asphalt purchases in the cases at bar, and the reading most charitable to the petitioners is that the court said it *could* affirm the district court's conclusion that the plaintiffs there faced "insuperable difficulties" of proof, none of which appear in the cases at bar.

4. Compare the more precise analysis that *Mangano* receives in the Petitioners' next to last footnote, Petition, page 18 n12.

5. Petition pages 7 and 18.

strates the pre-maturity of the issue for discretionary consideration by this Court. The "remoteness" issue of the cases at bar may well arise again, as anti-trust defendants attempt to use the *Hanover Shoe* case to deny recovery to end users. If, however, it continues to arise, it is exactly the kind of issue which will benefit from consideration by several Courts of Appeals, in the varying factual situations in which it will be presented. In the event the Courts of Appeals differ, only then will the issue mature, for full determination by this Court.

The issue of the cases at bar, unlike, for example, those anti-trust issues thrown before this Court by the Expediting Act,[6] can (and should) be more fully developed by the lower courts. The cases at bar, and the other similar cases that the Courts of Appeals may decide in the near future, when taken together will provide this Court with a background of well considered judgments for this Court's own deliberations—if indeed a grant of certiorari ever becomes necessary or desirable on this issue.

## CONCLUSION

This Court should deny the Petition for Certiorari because the issue it presents has not yet ripened for this Court's discretionary adjudication.

Respectfully submitted,

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6. 15 U.S.C. § 29; cf. the Chief Justice's fifth footnote in his partial dissent in *Ford Motor Company v. United States*, 405 U.S. 562 at 595 (1972) ". . . we would be immeasurably aided by the screening process provided by a Court of Appeals review."